

Latumeten (Migration) [2018] AATA 2691 (6 July 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Grethy Yovanka Latumeten
CASE NUMBER:	1801466
DIBP REFERENCE(S):	BCC2016/2202429 OSF2013/033513
MEMBER:	Christine Kannis
DATE:	6 July 2018
PLACE OF DECISION:	Perth
DECISION:	The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 100 (Spouse) visa.

Statement made on 06 July 2018 at 7:12am

1.

CATCHWORDS

Migration – Cancellation – Partner (Migrant) (Class BC) – Subclass 100 (Spouse) – Change in circumstances – Parties divorced – Marital difficulties – Genuine and continuing relationship at the time of immigration clearance – Decision under review set aside and substituted

LEGISLATION

2. *Migration Act 1958 (Cth)*, ss 104, 107, 109, 375A

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 100 (Spouse) visa under s.109(1) of the *Migration Act 1958* (the Act).
4. The delegate cancelled the visa on the basis that the applicant failed to notify the Department of a change in her circumstances. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
5. The applicant appeared before the Tribunal on 30 April 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's husband, Mr Giancarlo Chira and from her daughters, Ms Eveline Tavares and Ms Prisca Adekal. The witnesses each gave evidence regarding the support provided by the applicant and the hardship that would result if she was required to depart Australia.
6. The Tribunal was assisted by an interpreter in the Indonesian and English languages.
7. At the commencement of the hearing the Tribunal informed the applicant that specified folios of the Department file were subject to a s.375A certificate. The Tribunal explained the effect of such a certification is that the Tribunal is prohibited from disclosing the document and/or information in it to the applicant. The Tribunal informed the applicant that the basis for the certification was that disclosure of information would be contrary to the public interest because the information should be treated as having been provided in confidence.
8. The Tribunal decided the certificate was valid. The Tribunal provided the applicant with a copy of the s.375A certificate. The Tribunal informed the applicant that the information was relevant to the review. The Tribunal told the applicant it would not be releasing the details of the information to her but indicated that it would release the information in general terms.
9. The applicant was represented in relation to the review by her registered migration agent.
10. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

11. CONSIDERATION OF CLAIMS AND EVIDENCE

12. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
13. In this matter the applicant's visa was cancelled under s.104 of the Act. Under s.104(1), if circumstances change so that an answer to a question on a non-citizen's application form or an answer under s.104 is incorrect in the new circumstances, the non-citizen must, as soon as practicable, inform an officer in writing of the new circumstances and of the correct answer in those circumstances.

14. Relevant to this matter s.104(3) says that if the applicant is outside Australia at the time the visa is granted, subsection (1) only applies to changes in circumstances after the application and before the applicant is immigration cleared.
15. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
16. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

17. Background

18. The applicant is a 54 year-old Indonesian national. She met Mr John Stephen Green in June 2009 in Australia. She returned to Indonesia in late 2009 and remained in contact with Mr Green. In January 2010 she commenced living with Mr Green in New South Wales, Australia and on 14 March 2010 they were married. On 17 December 2013 the applicant departed Australia and returned to Indonesia.
19. On 18 December 2013 the applicant lodged a Form 47SP – Application for Migration to Australia by a Partner. Her sponsor for the application was Mr Green. In response to question 69 of the form the applicant indicated that her relationship with Mr Green was genuine and continuing.
20. At question 88 of the form the applicant undertook to advise the Department of any changes to her personal circumstances while the application was being processed, including her permanent residence application. The applicant also undertook to inform the Department if her relationship with Mr Green broke down or ended in divorce, separation or death before the application was decided.
21. On 6 February 2014 the Department conducted an interview with the applicant during which she said Mr Green had told her during their most recent telephone conversation that he wished to withdraw his sponsorship because the visa process was taking too long.
22. The applicant travelled to Perth Australia in August 2014 for her daughter's wedding. Her daughter paid for the air ticket. During her stay in Perth the applicant spoke to Mr Green by phone almost every day and he told her he wanted to see her and that he would buy her an air ticket to New South Wales. He did not buy her a ticket and she returned to Indonesia.
23. The Tribunal had regard to the record of contact made by Mr Green to the Department on 14 October 2014. On that date Mr Green advised that he wished to continue sponsoring the applicant's visa and said they had resolved their problem and that they had been apart for ten months and both missed each other very much. He said he had changed his mind about withdrawing the sponsorship and explained that he had sent in the withdrawal letter because he felt hopeless that he could not be with the applicant and missed her terribly.
24. The Department granted the applicant a Subclass 100 Partner visa on 17 October 2014 on the basis of her relationship with Mr Green.
25. Mr Green travelled to Indonesia in November 2014 and returned to Australia in mid-January 2015.

26. The applicant travelled to Perth Australia on 29 January 2015 to see her newborn granddaughter. Her daughter paid for the air ticket.
27. In February 2015 the applicant relocated to Adelaide because Mr Green had made threats against her and her son-in-law in Perth.
28. The Department received information that the applicant had separated from Mr Green on 18 December 2013. This information was contained in an Application for Divorce dated 24 November 2015 made by the applicant.

Was there non-compliance as described in the s.107 notice?

29. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with s.104 in the following respects; the visa holder failed to inform an officer of the Department in writing of a change to her circumstances (ending of her spousal relationship) prior to being immigration cleared into Australia on 29 January 2015.
30. In response to the s.107 notice the applicant provided the following reasons why she did not agree that there had been non-compliance:
 - She married Mr Green on 14 March 2010 and she was in a genuine and continuing relationship with him on 18 December 2013. It would not have been in her best interests to separate from Mr Green on the date she lodged an application for a Partner visa.
 - She acknowledged the Application for Divorce stated the date of separation was 18 December 2013 however her lawyer completed the form and she made a genuine mistake. She did not realise the mistake until she received the Notice of Intention to Consider Cancellation (NOICC) of her visa.
 - She was in a genuine and continuing relationship with Mr Green until January 2015.
 - When she was in Indonesia in 2014 she communicated with Mr Green by phone and text messaging.
 - Mr Green visited her in Indonesia in November 2014 and they were together in Surabaya on 11 January 2015.
 - She returned to Australia on 29 January 2015 which was the date she consciously decided to separate from Mr Green. By this time she had had enough and resisted Mr Green's attempts at reconciliation. He had not sent her an air ticket to return to Australia as previously promised.
 - She wanted to start a life in Australia with Mr Green however his aggressive and mercurial behaviour towards her and his inability to fulfil his promise to buy an air ticket for her made it difficult for them to work things out.
 - In January 2015 Mr Green found out she had flown to Perth to visit her granddaughter and he threatened to send a friend to Perth to smash her and break her legs if she did not join him in Newcastle. She then moved to Adelaide and Mr Green continued to verbally abuse her by phone. He posted a photo of her in the bath on Facebook and threatened to cancel her visa.

- Her relationship with Mr Green ended in early 2015 and they were divorced on 10 March 2016.
 - Despite Mr Green's irrational behaviour he was committed to their relationship and he sent money to express his condolences when her mother passed away and he accompanied her to her father's funeral.
31. Prior to the hearing the applicant provided additional documents to the Tribunal including, but not limited to written statements and letters of support made by various people.
 32. Westpac statements for an account in the applicant's name only for the period from 31 October 2013 to 4 March 2015 were also provided. The statements indicate credit transactions from New South Wales, the last of which was made on 5 February 2015. The applicant said the transactions were transfers of money to her from Mr Green.
 33. The applicant told the Tribunal that her relationship with Mr Green ended at the end of January 2015 or in early February 2015. She described the relationship as "up and down" and said things were good when Mr Green was stable. When she arrived in Perth on 29 January 2015 she did not consider the marriage to be over. Mr Green was angry that she had travelled to Perth but he had not sent her an air ticket to reunite with him in New South Wales. He told her that when she came to Newcastle he would kill her and chop her legs off. She decided on the evening of 29 January 2015 that she could not continue in the marriage.
 34. The applicant's evidence regarding the date of separation varied from saying she decided the marriage was over on the evening she arrived in Australia to sometime in February 2015. The Tribunal accepts that the relationship was complicated by Mr Green's changing attitude. The Tribunal accepts the applicant's evidence that he made threats against her and did not provide air tickets when promised and that he also made regular deposits into her bank account, the last of which was made on 5 February 2015.
 35. The applicant told the Tribunal that after her visa was granted on 17 October 2014 Mr Green travelled to Indonesia to spend time with her. He stayed for two months and left in mid-January 2015. Her father passed away on 5 December 2014 and Mr Green attended the funeral with her on 7 December 2014. A DVD of the funeral was provided to the Tribunal.
 36. The applicant said Mr Green remained in Indonesia for New Year and he celebrated his birthday there on 14 January 2015. She said she cooked him dinner at home that night.
 37. The Tribunal was satisfied that at the time of being immigration cleared on 29 January 2015 the applicant believed that she was in a genuine and continuing relationship with Mr Green. The relationship was difficult but it was not over when she returned to Australia.
 38. The Tribunal had regard to the information subject to a s.375A certificate as set out in paragraph 5 hereof. In general terms information was received from Mr Green that until he was served with the Application for Divorce he did not consider that he and the applicant were separated. He said they had been on holidays in December 2014/January 2015 and he said the marriage was not over on 18 December 2013 as stated in the Application for Divorce. He said he considered the marriage was over when he was served with the Application for Divorce. There was no information before the Tribunal with respect to the date of service however the Application for Divorce was filed on 1 December 2015 and therefore the date of service would have been after that date.
 39. The Tribunal accepts the applicant's explanation set out in her response to the s.107 notice that her Application for Divorce incorrectly indicated the date of separation was 18 December 2013 and she did not realise the mistake until she received the NOICC.

40. Having regard to the totality of the evidence, the Tribunal is satisfied that when the applicant was immigration cleared on 29 January 2015 she believed she and Mr Green were in a continuing and genuine relationship. Shortly after her arrival in Australia the applicant decided she could not continue in the relationship and she relocated to Adelaide and started a new life.
41. For these reasons, the Tribunal finds that there was no non-compliance by the applicant in the way described in the s.107 notice. It follows that the discretionary power to cancel the applicant's visa does not arise.
42. The Tribunal observes that neither the Form 47SP – Application for Migration to Australia by a Partner nor the applicant's Visa Grant Notice indicate that she was required to advise of a change in her circumstances with respect to her relationship after her application was decided. The Tribunal could find no evidence that the applicant had been advised that because she was outside Australia when her visa was granted she was required to advise of a change in her circumstances before she was immigration cleared.

DECISION

43. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 100 (Spouse) visa.

Christine Kannis
Member

ATTACHMENT – *Migration Act 1958* (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

104 Changes in circumstances to be notified

- (1) If circumstances change so that an answer to a question on a non-citizen's application form or an answer under this section is incorrect in the new circumstances, he or she must, as soon as practicable, inform an officer in writing of the new circumstances and of the correct answer in them.
- (2) If the applicant is in Australia at the time the visa is granted, subsection (1) only applies to changes in circumstance before the visa is granted.
- (3) If the applicant is outside Australia at the time the visa is granted, subsection (1) only applies to changes in circumstances after the application and before the applicant is immigration cleared.
- (4) Subsection (1) applies despite the grant of any visa.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
 - (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or

- (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
- (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.